The convention refugee determination process in Canada: Its reform

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The Convention Refugee Determination Process in Canada: Its Reform

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THE CONVENTION REFUGEE DETERMINATION PROCESS IN CANADA: ITS REFORM

ISSUE DEFINITION

Growing numbers of individuals arrive in Canada, either illegally or legally, and apply from within our borders for the rights and protection afforded refugees under the Geneva Convention and its Protocol, and, since 1978, under Canadian law.* The Convention refugee determination process as set out in the Immigration Act, 1976 exists to establish whether these claimants are in fact entitled to the status and rights of Convention refugees. In this decade, it became increasingly evident that the original process as designed in 1976 was inadequate both legally, to fully protect the rights of legitimate claimants, and practically, to discourage ill-founded claims and provide quick decisions. As the 33rd Parliament considered and adopted a new refugee determination process, many issues were at stake. Chief among these were: Canada's adherence to the Geneva Convention and its Protocol; continuing public support for a humanitarian and generous refugee policy; and questions of balancing efficiency with procedural fairness to claimants.

BACKGROUND AND ANALYSIS

A. International Law

Although Canada played a role in drafting the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, it did not accede to these until 1969. By signing, Canada became one of the more

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* Refugees also seek asylum in Canada by applying from outside Canada at consular facilities under special immigration rules. Some of the issues involved in this form of admission are discussed in CIR 80-10E.

than 100 states which accept both the United Nations definition of a refugee and the principle of non-refoulement. That is, in a significant deviation from the principle that a sovereign country has absolute control over who is permitted to enter and remain in its territory, we agreed not to force refugees to return to their country of origin. Until 1978, when Canada's present Immigration Act came into force, these international obligations had not been mirrored in our domestic legislation and the procedures for refugee determination had been largely informal and discretionary.

B. The Former System

The Immigration Act, 1976 adopted the Convention definition of a refugee and established a formal procedure for determining refugee claims. Section 2(1) states:

> "Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or
>
> (b) not having a country of nationality, is outside the country of his former habitual residence and is unable to return to that country.

Convention refugees can be denied permission to stay in Canada if they have been convicted of a serious criminal offence, or have engaged in or are likely to engage in acts of espionage, subversion or violence.

Bill C-55 received Royal Assent in July 1988 and is expected to come into force early in 1989. The following describes the law as it existed prior to the coming into force of Bill C-55 (now S.C. 1988, c. 35). Those procedures provided that any person illegally in Canada could claim refugee status. A claim was officially made during the course of an inquiry held to determine whether an individual was in violation of the Immigration Act, 1976. Following a claim, that inquiry had to be

adjourned. People who were in Canada legally were permitted by administrative decision to make a claim, but if it was refused they lacked the appeal rights provided by the Act. They could, however, make another claim if they lost their legal status.

The claimant made his or her case under oath at a separate examination conducted by a senior immigration officer. Note that this officer was not a decision-maker. Representation by legal counsel was permitted at the examination and interpretation services were provided if necessary. The transcript of the examination and a copy of the claim were sent to the Minister of Employment and Immigration, with a copy to the claimant.

By law the file was referred to the Refugee Status Advisory Committee (RSAC) which in theory advised the Minister on the claim before he or she made a decision. In practice, files went directly to RSAC, whose opinion was reviewed by the Minister, who acted in these matters through delegates. RSAC was centralized in Ottawa and composed of full-time and part-time members appointed by the Minister. Panels of three members decided cases on the basis of the written transcript taken by the senior immigration officer. As a method of expediting decisions, in May 1983 RSAC began to have single members attend some examinations under oath (with the consent of the claimant). These oral hearings were expanded as part of the "fast track" system to deal with claimants who made their claims before the new system was in place, but who were not eligible for the administrative review (see below). RSAC's rate of acceptance of claims was historically approximately 30%.

Claimants whose claims were accepted were normally given Minister's permits and processed towards permanent residence, provided that medical, criminal and security requirements were met. If refugees had close family members living abroad, procedures were begun to reunite them.

Negative decisions were automatically referred to a Special Review Committee in Employment and Immigration which reviewed the file in case there were special humanitarian or compassionate grounds for admission to Canada.

Claimants turned down by the Minister could appeal to the Immigration Appeal Board (IAB) for redetermination of their claim. Prior to 4 April 1985, the IAB, following the procedure established by the Act, reviewed the application on paper and granted an oral hearing only if there were, in the words of former section 71 of the Immigration Act, 1976, "reasonable grounds to believe that a claim could, upon the hearing of the application, be established ..."

In April, 1985, however, the Supreme Court of Canada rendered its decision in Re Singh v. Minister of Employment and Immigration. The court held that section 71 of the Act was unconstitutional because the lack of an oral hearing deprived applicants of constitutionally protected legal rights. The Immigration Act, 1976 was then amended so that as of March, 1986 all applicants for redetermination had the right to an oral hearing before the Board.

If the IAB rendered a negative decision on a redetermination application, the claimant was entitled to judicial review of the Board's decision by the Federal Court of Appeal, followed by an appeal to the Supreme Court of Canada if the latter agreed to hear the case.

C. The Need for Reform

The process as it was designed in the 1970s had appeared to be straightforward. If claims had remained at the level of a few hundred a year, it might have continued, with some changes, to operate effectively. From its inception, however, critics drew attention to a major flaw of procedural fairness. At no point in the proceedings did the refugee whose claim was being assessed have an opportunity to be heard in person by the decision-maker. In addition, the all-important examination of the claimant was conducted by an immigration officer, rather than by a refugee specialist, and the entire process could be lengthy and cumbersome. These defects in the system led to continuing criticism by organizations concerned for refugees, court challenges, and lengthening backlogs, all of which began to appear shortly after the new Immigration Act, 1976 came into effect in 1978.

In September 1980, the Minister of Employment and Immigration, the Honourable Lloyd Axworthy, formed an advisory Task Force of practising lawyers and law professors to study immigration practices and procedures. Its report on refugees, The Refugee Status Determination Process, appeared in November 1981 and concluded that the process, with its fragmentation and reliance upon transcripts, was inherently slow. It was taking well over a year from the time a claim was first made to the communication of a decision by the Minister. Redetermination of an adverse decision by the Immigration Appeal Board could bring the total time close to two years. There was a clear danger that, as delays in the determination process increased, claimants would integrate themselves into Canadian life so that it would become increasingly difficult to require them to leave, no matter what was decided about their status as refugees.

The report made many recommendations, the most important of which was that refugee claimants should be entitled to an oral hearing in every case where the Refugee Status Advisory Committee was not prepared to make a positive recommendation on the basis of the transcript alone. To eliminate the backlog and implement this and the other recommendations, major increases to the personnel and resources of RSAC would be necessary. The report also recommended that the existing process of refugee determination be replaced by a system based on a central tribunal with a full hearing at the first level. The government implemented most of the administrative recommendations in 1981 and RSAC began to experiment with oral hearings on a limited basis, but no major changes to the legislation were introduced.

By early 1983 it had become quite clear that the process as established by the Immigration Act, 1976 could not keep up with the escalating number of new claims. Between 1977 and 1982, the number of claims each year had risen from about 500 to more than 3,000. Speaking to the House of Commons Standing Committee on Labour, Manpower and Immigration in May 1983, the Minister noted that more than 350 claims to refugee status were being made each month, some 7,000 cases were under review or appeal and that it took as long as three years for a claimant to exhaust all levels of appeal in the system.

Prior to the development of new legislation, Ed Ratushny, Special Adviser to the Minister, was asked to review the existing problems and suggest options for change which might be considered. He submitted his report in May 1984 to a new Minister, the Honourable John Roberts, on the eve of a general election. A New Refugee Status Determination Process for Canada concluded:

> Our present system is riddled with anomalies, inconsistencies and other shortcomings which may not have been foreseeable when it was established. However, subsequent judicial interpretation and increasing pressure created by international conditions have demonstrated that our system is both cumbersome and susceptible to abuse. Moreover, there is general acceptance of the need for oral hearings. (p. 22)

Ratushny presciently warned that the Canadian Charter of Rights and Freedoms could impose higher standards of procedural fairness on the system and that any new system must reflect this fact. He noted also that fairness should be reflected in the personal qualities, training and experience of the decision-makers and that a speedier process would be more humanitarian to bona fide refugees and would discourage abusive claims. In this regard, he recommended that any new process should include preliminary procedures, with proper safeguards, to screen out at an early stage claims with no hope of success. In order to avoid duplication, this decision should be made by the same individuals who determine refugee status.

Although a purely administrative model of refugee determination was considered the most efficient, Professor Ratushny rejected it as being too closely tied to immigration enforcement and unlikely to win public support. On the other hand, a completely judicial model would achieve a high degree of procedural fairness but would be slow, expensive and not conducive to the development and application of specialized expertise. Consequently, he favoured a quasi-judicial model which could develop a high degree of expertise and would make it easier for representatives from the office of the United Nations High Commissioner for Refugees to participate. The report sketched three possible quasi-judicial options without recommending any one of them. General elections and the

formation of a new government necessarily delayed concrete action on this report.

In the spring of 1984, the Hon. John Roberts had requested Rabbi Gunther Plaut to advise the government on reform of the system. He reported to the next Minister, The Hon. Flora MacDonald, and she published Refugee Determination in Canada in April 1985. The Plaut report offered a compassionate and comprehensive analysis of the refugee determination dilemma, and made numerous recommendations about the humanitarian and judicial qualities that should guide the deliberations and decisions relating to refugees. Rabbi Plaut proposed three models for a reformed process. Model A proposed an oral hearing before a three-member panel with an appeal to the Federal Court of Appeal. In Model B, the oral hearing would be before a one-member panel, with a paper review by a three-member panel in Ottawa and appeal, with leave, to the Federal Court of Appeal. Model C also would begin with an oral hearing before a single-member panel, followed by an appeal which would take the form of a new hearing before a three-member panel of the appeals section of the new refugee board. Finally, the claimant could appeal, with leave, to the Federal Court of Appeal.

Just as Rabbi Plaut was finishing his report, in April 1985, the Supreme Court of Canada rendered the Singh decision mentioned in section B, above. Now all refugee claimants who were asking the Immigration Appeal Board to redetermine their case had a right to an oral hearing. Not only did this add to the existing backlog at the Board but the increasingly apparent inefficiency of the system as a whole was encouraging many weak claims. Claimants knew they would be able to remain and work in Canada for a considerable period of time before their case was finally disposed of. The backlog, which had stood at 13,800 when Rabbi Plaut reported, grew to over 20,000 within a year.

Against this background of numerous reports, successful legal challenges to the existing law and a mounting backlog, the Commons Standing Committee on Labour, Employment and Immigration studied the Plaut Report and the existing refugee determination system. In its extensive Report in November 1985 the Committee agreed with many of Rabbi Plaut's

general recommendations and approaches, but made its own proposal regarding specific procedure. It suggested that the initial decision should be made by a two-member panel, with two negative votes required to reject an applicant. Appeal would be by leave to the Federal Court of Appeal. In his statement in the House of Commons on 21 May 1986, the Minister of State (Immigration) accepted the Committee's model in announcing the various elements to be included in the upcoming legislation. Meanwhile, though the number of refugee claims continued to mount, reaching 8,400 in 1985 and 18,000 in 1986, no legislation was tabled. In 1987, the number of claims reached 26,000.

New pressures began to be felt at the end of 1986 and during the early weeks of 1987 in response to changed circumstances in the United States. A new law, passed in November 1986, granted amnesty to some illegal residents in that country if they had arrived prior to January 1982. Central Americans arriving in the United States after that date, and those who had lived there prior to that time but could not substantiate it, faced deportation. Salvadorans and Guatemalans began to flee to Canada as a result, some 1,000 per week immediately prior to the imposition of control measures discussed in section F, below.

Pressure mounted again when 174 claimants, almost all of them East Indians, landed in Nova Scotia on 12 July 1987. Although they claimed to have sailed directly from India, there was evidence that this was not the case. Since none of the arrivals had proper documentation, officials detained the whole group pending identification and security checks. Public opinion was aroused by what seemed to be such an unorthodox arrival, although approximately 500 claimants, many of whom also lack proper documentation, arrive each week and claim status.

D. Administrative Review

In the May 1986 statement to the House, the Minister announced details of an administrative review of the refugee claimant backlog, which by then had risen to over 20,000 claimants. Individuals who qualified under the review were given permanent resident status in Canada as quickly as possible, subject to the standard statutory requirements of

health, criminal and security checks. Between August 1986 and August 1987, approximately 86% of applicants were successful and were given landed status. Of these, 89% were accepted on economic criteria, 9% for humanitarian reasons, and 2% as members of the family class.

E. The Current Situation

Individuals denied landing under the administrative review were still eligible to have their claims heard under the unreformed determination process. From May 1986 until 20 February 1987 the system was limited to claimants from countries to which Canada returned people. This policy ensured that most of the claimants were not from traditional refugee-producing countries and explained the low rate of acceptance by RSAC (about 10%).

Claimants from countries to which Canada did not deport people were issued Minister's permits valid for one year. Between May 1986 and 20 February 1987, after which permits were no longer issued, 10,606 permits were given out. Meanwhile, in the absence of new legislation, a new backlog quickly accumulated. **Including those on permit, there were some 70,000 potential refugee claimants in all stages of the system as of the end of November 1988, fuelling speculation that another administrative review would be necessary.**

F. Interim Control Measures

On 20 February 1987 the government announced an interim package of control measures designed primarily to limit the large numbers of Central Americans coming across the American-Canadian border to claim refugee status. An existing section of the Immigration Act, 1976 permitting immigration officers to require people to return to the United States pending their inquiries had not been in use for those people from countries to which Canada did not return people. As of 20 February those people no longer received automatic entry on Minister's permits and the section of the Act requiring return to the United States was once again applied. This meant a wait of six to eight weeks for claimants at busy ports of entry and a very short wait at other crossing points. Once in

Canada for their inquiries, claimants could not be removed during the process of examination under oath, consideration by RSAC and the decision of the Minister as described above. Claimants were not permitted to work prior to the taking of their examination under oath.

At the same time, the regulations were changed to require transit visas for all people from countries for which Canada requires visitor visas. This change primarily affected Chileans who had been claiming refugee status during stopovers in Canada on flights destined for Europe.

PARLIAMENTARY ACTION

On 5 May 1987 Bill C-55 to establish a new refugee determination process received first reading. The bill differed in some very significant ways from the plans for the process that had been announced the previous May, primarily in the area of access controls. Particularly controversial was the provision to allow swift return to a "safe third country" for claimants who had been in another country prior to their arrival in Canada. Safe countries would be prescribed in regulations made by the Governor in Council.

The other new element at the initial stage of the new process was a hearing to eliminate claims without a credible basis. Claimants not eligible to have their claims heard, or who were eligible but whose claims lacked a credible basis would be removed quickly. They could apply for leave for judicial review to the Federal Court, but would await the decision outside the country.

Other features of the new system include:

- a new independent body, the Immigration and Refugee Board, to hear eligible and credible cases referred to it;
- an oral hearing before the Board in a non-adversarial format;
- a panel of two members to make the refugee decision, with split decisions decided in favour of the claimant;

- an appeal to the Federal Court of Appeal with leave of that court; and
- participation as an observer by any representative of the United Nations High Commissioner for Refugees.

Bill C-55 was passed by the House of Commons on 21 October 1987. After extensive public hearings, the Standing Senate Committee on Legal and Constitutional Affairs in May recommended amendments to the bill which were largely rejected by the government. **The bill was ultimately passed on 21 July 1988 and received Royal Assent immediately. It is expected to be in force by the beginning of 1989.**

In response to the arrival on the shores of Nova Scotia of 174 refugee claimants in July 1987, Parliament was recalled on 11 August to deal both with Bill C-55 and with a supplementary bill, C-84, to give the government increased powers to deal with claimants and with the people who transport them. Bill C-84 allows for detention of people unable to satisfy an immigration officer of their identity or for people thought to be security risks; permits officers to order ships carrying people without proper documents to leave or not to enter Canadian waters; and imposes heavy penalties (fines up to $500,000 and imprisonment for up to 10 years) for bringing improperly documented people into Canada. The bill, criticized by lawyers, church and humanitarian groups and constitutional law professors, was passed by the House of Commons on 14 September 1987. The Senate referred it to the Standing Senate Committee on Legal and Constitutional Affairs which reported to the Senate on 15 December 1987, recommending extensive amendments. The Senate concurred with the report and returned the bill on the same day to the Commons as amended.

The government responded on 26 January 1988 to the Senate's amendments, accepting some of them but declining to accept others. The Senate responded by again referring the bill to the Standing Senate Committee on Legal and Constitutional Affairs, which recommended in March 1988 that the Senate insist on its previous amendment to eliminate the power to turn ships around. The Senate agreed and sent a message to the House to that effect. **The government at this point significantly modified that contentious provision and the Senate finally passed the bill on**

21 July. It received Royal Assent the same day and came fully into force on 15 November 1988.

CHRONOLOGY

1969 - Canada acceded to the United Nations Convention relating to the Status of Refugees (1951) and the Protocol (1967).

1978 - The Immigration Act, 1976 formalized procedures for the determination of Convention refugee status for those claiming such status within Canada's borders.

1981 - A Task Force established by the Honourable Lloyd Axworthy recommended that the refugee determination system be overhauled and oral hearings introduced. (The Refugee Status Determination Process)

1984 - Special advisor Ed Ratushny called for changes to the existing system to introduce greater procedural fairness and streamline the system. (A New Refugee Status Determination Process for Canada)

April 1985 - The Supreme Court of Canada handed down its decision that claimants requesting a redetermination of their claims before the Immigration Appeal Board were entitled to an oral hearing. (Re Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177.

April 1985 - Rabbi Gunther Plaut completed his analysis of the defects of the present system and proposed three models for reform. (Refugee Determination in Canada)

November 1985 - The Commons Standing Committee on Labour, Employment and Immigration released its study of the Plaut report and proposed its own model for reform.

March 1986 - Royal Assent was given to the bill amending the Immigration Act, 1976 to provide oral hearings for all refugee claimants applying to the Immigration Appeal Board for a redetermination of their claim.

May 1986 - The government announced details of its proposed reform of the refugee status determination process and indicated it would introduce the necessary legislation to Parliament in the fall of 1986. Details were announced regarding the administrative clearance to deal with the backlog of over 20,000 refugee claimants.

February 1987 - Interim Control measures were introduced to require claimants coming from the United States to wait there pending their inquiry and to require transit visas for all people from countries for which visas are required.

May 1987 - Bill C-55 was introduced.

August 1987 - Bill C-84 was considered by Parliament in a special summer recall.

September 1987 - The House of Commons passed Bill C-84; The Senate referred the bill to its Standing Committee on Legal and Constitutional Affairs.

October 1987 - The House of Commons passed Bill C-55. The Senate referred the bill to the same Committee.

December 1987 - The Senate returned Bill C-84 to the Commons with extensive amendments.

January 1988 - The Commons accepted some Senate amendments to Bill C-84 and rejected others. The Senate referred the bill once again to the Standing Committee on Legal and Constitutional Affairs.

March 1988 - The Senate adopted the Committee's report on Bill C-84, which recommended that the Senate insist on deletion of the power to turn ships around. The Senate sent a second message to the House.

May 1988 - The Senate adopted the report of the Committee relating to Bill C-55 which recommended amendments.

June 1988 - The House of Commons rejected most of the Senate's amendments to Bill C-55.

July 1988 - The House modified the provision in Bill C-84 relating to ships and the Senate passed the bill.

- The Senate passed Bill C-55.

November 1988 - Bill C-84, having been proclaimed in stages, came fully into force.

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